UNITED STATES OF AMERICA.

STATE OF LOUISIANA,

SUPREME COURT OF THE STATE OF LOUISIANA.

NEW ORLEANS, MONDAY, JANUARY 18, 1892.

No. 10,870.

Opinion of Justice Breaux.
Concurring opinion of Justice Fenner.
Dissenting opinion of Justice Watkins.

MRS. SALLIE C. PUGH

versus

MOORE, HYAMS & CO.

L. GRAHAM & SON, 99, 101, 103 GRAVIER ST., N. O.

The clerk of the Supreme Court of the United States, under this stipulation and agreement, is to annex the same to the record now standing for submission under the 20th rule.

FARRAR, JONAS & KRUTTSCHNITT,
For Pl'ffs.

HENRY L. LAZARUS, *Att'y for Def't.*

[Endorsed:] 14766 Supreme Court U. S. 1891, October term. No. 1292. Victor Meyer *et al.*, pl'ffs in error, vs. Walter F. Richards. Stipulation to amend record & amendments.

[Stamped:] Office Supreme Court U. S. Filed Jan. 5, 1892. James H. McKenney, clerk.

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The court was duly opened, pursuant to adjournment. Present their Honors: Charles E. Fenner, Lynn B. Watkins, Samuel D. McEnery, Joseph A. Breaux, Associate Justices. Absent, Edward Bermudez, Chief Justice.

His Honor Mr. Justice Breaux pronounced the opinion and judgment of the court in the following case:

No. 10,870.

MRS. SALLIE C. PUGH

versus

MOORE, HYAMS & CO.

Appeal from the Civil District Court for the Parish of Orleans.

Plaintiff sues to recover of defendants the amount paid them for five State bonds she alleges are worthless.

They were bought by her on the 24th of April, 1889, for the sum of $4443.75.

She subsequently discovered that these bonds were not valid, and that the State claimed them, as they had been fraudulently reissued.

Four of these are numbered 742, 842, 866, and 883, and are part of the consolidated bonds held by the treasurer of the State of Louisiana, for the use of the "Agricultural and Mechanical College," and which are null and void, since the first day of January, 1880, under Article 233 of the Constitution.

In addition to their nullity this article prescribes, that the General Assembly shall never make any provision for their payment, and that they shall be destroyed.

Another of the bonds bought is numbered 5611, and is a consolidated bond, which had been exchanged, under Act 121 of 1880, for a constitutional bond.

The Act just quoted orders, in matter of the exchange of constitutional for consolidated bonds, that the treasurer, before delivering the former, shall designate in blanks kept for the purpose, on the face thereof, the numbers of the old consolidated bond for which the new was given in exchange.

And shall stamp the consolidated bond received, after having detatched from it the coupon which fell due on the 1st of January, 1880.

Reports were to be made by the treasurer to the auditor, at the end of each quarter, showing the number and denomination of all the consolidated bonds stamped, as required.

They were to be destroyed.

It was under the provision of the said Act that this bond, 5611, was received by the treasurer.

Plaintiff tendered the bonds to the defendants and demanded valid bonds, in lieu, or the price.

The defendants, in their answer, plead that they acted as brokers, and not as vendors.

That these bonds were negotiable instruments, not yet due, transferable by delivery, and did not entail any liability or warranty upon the vendor, and that they had been issued by the State and put in circulation by its officers, for full value, and that their rights are protected by the constitution and laws of the United States and the Law Merchant, by which they must be decided.

There was judgment for plaintiff, and the defendants have appealed.

With reference to the capacity in which the defendants acted, whether as brokers or principals, we summarize the evidence, as follows:

That defendants are brokers by occupation, and that at the date of the sale of these bonds to the plaintiff they were engaged in buying bonds for themselves and others; that plaintiff's agent asked a member of the defendant firm to let him have some of these bonds for his principal at cost price.

That this was declined unless a broker's commission was paid; that this the agent finally consented to pay.

This is corroborated by another member of the firm.

The agent corroborates these statements in some particulars, but denies that he dealt with the defendants as brokers and that there was any brokerage compensation.

It appears that no statement of the purchases was made and handed to the purchaser, as is customary when brokers act for third parties.

That the defendants did not at any time make known to plaintiff who was the principal and owner of those bonds, if they were not.

With reference to the fraudulent reissuing of the Mechanical and Agricultural College bonds, Nos. 782, 842, 866 and 883, and the possession of the State, the facts are

that they were designated in statement E of the report of the State Treasurer to the Governor for the year 1879, from which we copy: "To his Excellency, F. T. Nicholls, Governor of the State of Louisiana—Sir: In accordance with the requirements of law (Act No. 96, extra session, Sec. 80, of 1877), I respectfully submit the following report of the financial operations of this department of the past fiscal year, commencing the 1st day of January, 1879, to the 31st day of December, 1879, inclusive, embracing its receipts, disbursements, etc., from the various funds, as provided by existing laws."

The treasurer's report consists of statements A, B, C, D and E.

Statement "A" shows an account * * * * *
Statement "B" shows an account * * * * *
Statement "C" shows an account * * * * *
Statement "D" shows an account * * * * *
C, D and E.

Statement "E" shows a detailed statement of the bonds held "by the State Treasurer in trust for the Mechanical and Agricultural College, and the bonds belonging to the Louisiana State University; also, of the bonds returned by A. Luria, cashier of the Louisiana National Bank, on June 7, 1878, in exchange of warrant No. 2222, as *per* judgment of the Third District Court of New Orleans, No. 25,115, and of the Supreme Court of Louisiana, No. 7149, and pledge of the lessees of the Louisiana State Penitentiary," etc.

"The residue of the report is a compilation of the monthly reports of the banks, banking institutions, savings banks, etc., published in accordance with the provisions of Act 91, of section 6, of 1877.

"All of which is respectfully submitted,

"(Signed) E. A. BURKE, *State Treasurer.*"

Extract from the said report.

"STATEMENT E.

"Description of bonds on hand in the State Treasury, held by, and belonging to, the Agricultural and Mechanical College and to the Louisiana State University, etc.

"MECHANICAL AND AGRICULTURAL COLLEGE.

"One hundred and ninety-six bonds of $1000 each, issued by the State of Louisiana, under Act No. 3 of 1879, Nos. 710 to 905, inclusive," $196,000.

Necessarily including the bonds involved in this suit, viz.: Nos. 742, 842, 866 and 883.

Other official reports of subsequent dates were offered in evidence.

They were objected to on the ground that they were not the best evidence which could be produced.

The court overruled the objection and admitted the testimony.

The first report, that of 1879, shows that the bonds were in the treasury at the time it mentions, and while those made subsequently do not from personal knowledge establish that they were in the treasury in 1879, nevertheless they tend to prove the correctness of that of 1879.

The records of the State make proof of the verity of their contents, unless proven incorrect. Best on Evidence, page 454.

The fact that the treasurer was indicted in 1888 for alleged criminality in the fraudulent reissue of these bonds, and that he is a fugitive from justice, will not destroy the effect of records as evidence accepted at all times as correct previous to 1888.

With reference to the consolidated bond (5611):

It is proven that in 1883, it was presented to the State Treasurer to be changed for a constitutional bond. It was exchanged and extinguished.

The State claims their return and refuses to recognize them as a debt.

THE BROKER'S RESPONSIBILITY IN TRANSFERRING BONDS BY DELIVERY.

The first proposition presented by the defendants is that they acted as brokers and are not indebted for the amount claimed.

In considering this defense, it is necessary to determine what are the functions of a broker.

He is an intermediary employed to negotiate a matter between two parties, and for that reason is considered a mandatory of both.

When he is the mandatory of the purchaser and buys from a third party, the agency must be disclosed, either at the time of the contract or on the trial, in order that he may be considered the broker and relieved from all responsibility as principal.

If the plaintiff has a right of action, it cannot be defeated, as in this case, by withholding the name of the principal and pleading the exemption of a broker.

We quote from Daniels, Vol. 1, p. 684.

"It is quite clear that if a broker or other agent transfer property by delivery without disclosing who his principal is, he is himself to be regarded as principal in the transaction, although the party dealing with him may have known that he was the broker or agent for some person."

"And this doctrine has been applied to compel a broker to refund money paid for note sold by him to the plaintiffs, although he had paid over the money to his principal."

LIABILITY OF THE ASSIGNOR OF BONDS PAYABLE TO BEARER.

In the order of the defense, the defendants next contend, that it is well established that the buyer has no cause of complaint if he gets the exact thing he buys;

that each had the same means of information; neither had any suspicion that there was anything wrong with the bonds; that it was an ordinary case of bargain and sale, but essentialy a transaction in which both took their chances of loss; that these bonds were current in the market as Louisiana State bonds.

The representations made by vendors were in good faith and believed by both parties to be true—that they were selling valid bonds of the State of Louisiana.

The unquestioned intention of the plaintiff was to buy valid obligations of the State; instead she received five bonds that were null and void.

For these she paid a price for which she did not receive any consideration.

The question for our decision on this point is whether a purchaser who buys bonds in the market must lose the price, if he receives fraudulent re-issues of bonds instead of valid and binding obligations upon the State, which he intended to buy.

The question involves the necessity of deciding what are the liabilities of assignors of instruments payable to bearer.

The assignor of such an instrument guarantees that he has a good title to the instrument, and has a right to sell it.

The illegality of the instruments constitutes a failure of consideration.

Knowledge of the illegality on the part of the vendor is not essential to make him liable for the price received.

"We think whoever gives negotiable paper, transferable by delivery, warrants that the signatures are genuine;" and Mr. Justice Story, in his work on promissory notes, lays it down that there is a warranty of title.

Promissory Notes, paragraph 118.

He warrants "by implication, unless otherwise agreed, that its face is a true description of its character, both in respect to its genuineness, to its validity and legal operation, to the competency of the parties, and also that he is the lawful holder, having a valid title and right to transfer it, and that he has no knowledge of any facts which prove the paper, if originally valid, to be worthless, either by the insolvency of the principle, or by having been paid, or otherwise by having become void and defunct."

Daniel's, paragraph 737, 3d Edition.

The assignor engages that the instrument is what it purports to be, *i. e.*, the valid obligation of those whose names are upon it.

The rule, says Judge Parsons, is of universal application, that the vendor, without endorsement, warrants that the paper is of the kind and description it purports to be.

This is a well settled principle of Commercial Law, *i. e.*, implied warranty in sales as applicable to negotiable instruments transferable by delivery.

An exception arose under a decision of the United States Supreme Court, and a different rule was announced as applying to assignors and assignees of government securities, *i. e.*, that the assignor does not impliedly guarantee that the officers had authority to issue the securities he transferred by delivery.

In Otis *et al.* vs. Cullom, Receiver, 92 United States, 447, a city bond issued in Kansas was sold to plaintiffs.

The court held the bond void on the ground that the Legislature had no power to adopt the act authorizing its issue.

The transferrees sued to recover back what they had paid for the invalid bond.

The court held, that in such cases there is only an implied warranty of title and genuineness, and that if there was no guaranty and no fraud or misrepresentation

on the part of the vendor, the transferrees were without right to recover.

This case followed Lambert vs. Heath, an English case (15 Mee. and W. 486). The rule is the same in both.

In the last case the defendant bought for the plaintiff certain certificates of Kentish-coast railway scrip.

The directors repudiated the scrip, on the ground that the secretary had acted without authority in issuing them.

An action was brought to recover back the money paid for these invalid scrips.

The court said: "The question is simply this:

"Was what the parties bought in the market, Kentish-coast railway scrip?

"It appears that it was signed by the secretary of the company: and if this was the only Kentish-coast railway scrip in the market, as appears to have been the case, and one person chooses to sell and another to buy, then the latter has all he contracted to buy."

In both of these cases all the securities were null and void.

In the case at bar, only comparatively few bonds were worthless, and it happens that in buying, a large number that these sued on were of the worthless.

In a Nebraska case the distinction was made that there were two sets of securities in the market of the same general description, one legal and the other illegal, proof of which fact entitled the purchaser of the illegal securities to recover back the purchase money, on the ground that he had purchased something very different, viz.: the legal security of the same description.

12 Nebraska (1888), 28.

Judge Daniel referring to the case says, Vol. 1, paragraph 734: "The distinction is a clear one, and the decision of the Supreme Court, limited to the facts of the case before it, is not irreconcilable with the general prin-

ciples stated in the text, which we have had occasion to refer as applying to this case."

"While an assignment is not equivalent to an indorsement, a transfer without endorsement is of the same force as a sale of goods and does not fall under mercantile law."

Randolph, Volume 11, page 442.

The principles of implied guarantee by the assignor of securities payable to bearer is but slightly removed, if at all, from those laid down in the Civil Code respecting the liability of the vendor.

The seller is bound to warrant the thing which he sells, to maintain the buyer's peaceable possession and to guarantee against the hidden defects of the thing sold.

He who sells a credit or incorporeal right warrants its existence at the time of the transfer, though no warranty be mentioned in the deed. Civil Code, 2646.

The authorities agree that the assignor of a security, transferable by delivery, warrants that it is not fictitious.

The defendants contend that plaintiff had the knowledge they had with reference to these bonds; each had the same means of information; neither had any suspicion that there was anything wrong about these bonds.

That is undoubtedly true.

Against each of the parties to the suit the same presumption arises, that they had knowledge of the laws relating to these bonds.

They had the notice every one is presumed to have of the law.

The fact remains that in an intended purchase plaintiff has paid an amount for which she did not receive anything in return.

THE STATE IS NOT RESPONSIBLE FOR BONDS FRAUDULENTLY REISSUED IN VIOLATION OF HER LAWS.

The third and last ground of defense is that the defend-

ants were holders for value before maturity of negotiable paper of the State of Louisiana, and that, applying the law governing commercial paper, she is liable, and has incurred all the responsibilities of private persons under the same circumstances.

While this is in the main true, the State is not lightly exposed to pay its securities twice.

These bonds could not have any legal validity after they were withdrawn from commerce.

The theft committed in re-issuing them and the flagrant violation of the law made them valueless in any hands.

It is settled that debts unlawfully contracted by a municipal corporation are not binding upon it, although negotiable in form.

If there is no authority to issue its bonds or commercial paper, there can be no *bona fide* holder in the commercial sense of the term.

Township of East Oakland vs. Skinner, 4 Otto, 255.

Marsh vs. Fulton County, 10 Wallace, 676; School Directors vs. Fogleman, 76 Illinois, 789; Cecil vs. Board of Liquidation, 30 An. 34.

In Chisholm vs. The City of Montgomery, 2 Woods, p. 594, it was held that the negotiable form of the security did not preclude the defendant from denying the authority of the officers by whom the faith of the city had been pledged; that the officers and agents of private corporations entrusted by them with the management of their own business and property may subject their principals to the consequences of their unauthorized act, but that the body politic is not thus bound by the acts or declaration of its agents.

If it could be, unbounded scope would be given to the peculations and frauds of public officers; that third persons, holders of the bonds, were bound to take notice of the defects.

These and other exceptions have led us to the conclusion that all the responsibilities of private persons do not form part of the obligation of municipal corporation on its bond, nor of the State.

In John S. Caguin, respondent, vs. the Town of Hancock, 84 New York, it was held that there can be no *bona fide* holder of town bonds within the meaning of the law applicable to negotiable paper, as they are only binding upon the town when issued in the way pointed out by statute.

In Moffat vs. United States, 112 U. S. 25, the court decided that the United States do not guarantee the integrity of its officers and hold themselves bound by their misconduct or fraud.

Says the court in that case: "The position that, as the frauds charged were committed by officers of the United States, the court erred in not holding their acts to be binding, and in not giving to the patents the force of valid conveyances, is certainly a novel one.

"The government does not guarantee the validity of the acts of its officers. It prescribes rules for them, requires an oath for the faithful discharge of their duties, and exacts from them a bond with stringent conditions. It also provides penalties for their misconduct or fraud, but there its responsibility ends. They are but the servants of the law, and, if they depart from its requirements, the government is not bound. There would be a wild license to crime if their acts, in disregard of the law, were to be upheld to protect third parties."

District of Columbia vs. Cornell, 130 U. S. 655.

The State government required similar formalities to be complied with by its officers. The required oath was taken and bond furnished.

The criminal statutes provide punishment against their frauds. If with these requirements the responsibility of the

United States ends, for similar reason that also of the State ends.

"It has been held in England, in recent cases, that a corporate bond in negotiable form, which has come into the plaintiff's hands, for value, after having been stolen from the rightful owner, was subject to defense."

Randolph on Commercial Paper, paragraph 327.

Free school bonds were sold by the auditor and treasurer, under Act 81, of 1872.

The court declared the act unconstitutional and denounced it as an act spoliation, intended and designed to deplete the treasury of every available asset or fund.

State of Louisiana vs. Durant, 29 An., 81.

The Sun Mutual Insurance Company became the owner of eleven of these bonds before maturity, for valuable consideration.

Suit was brought by the company against the Board of Liquidation to have them funded.

The court decided against the application to fund, and held that the laws of 1855 and 1857, setting aside these bonds for the schools, took them out of commerce, and that third persons, however innocent, could not hold them as owners.

These bonds were sold under some color of law. The sale had legislative sanction, and the auditor and treasurer acted in compliance with a statute which was subsequently declared unconstitutional.

In matter of the bonds now under consideration, their reissue from the treasurer's office was an outrageous fraud which absolutely vitiates them in any hands in which they may be found.

By taxation private property is appropriated to public ends and legitimate purposes.

The element of negotiability of bills, notes and bonds makes a contract founded upon paper adopted for circu-

lation different, in many important particulars, from other contracts known to the law.

That element loses all force when paper has been placed in commerce in violation of law, to perpetrate a fraud upon the State.

The holder of a bond of a municipal corporation is bound to look to the action of the officers and ascertain whether the law has been so far followed by them as to justify the issue.

The right of a State can not be less.

The decisions relating to private corporations and to persons do not apply against the State.

The State's authority to issue bonds is founded on law of which every one is presumed to have knowledge.

Those who deal in State securities will be presumed to have examined them and to have known whether they could be in commerce.

The dealer in bonds of private corporations or in bills and notes of individuals has not the same opportunity of examination, and the same presumption of law does not arise.

The by-laws of corporations are not open to inspection by those who deal in securities issued by them, and therefore the reason for distinction.

Those who deal in State securities had opportunity to know whether the treasurer had any lawful right to issue them, for the reason that his authority, if any existed, was to be found in public statutes, and if they did not, in fact, examine, as it was their privilege to do, before buying, they will be presumed to have done so, and to have known that they were issued without authority of law, and therefore void in the hands of any holder, either with or without notice.

The bonds sued upon are the property of the State, and

were within her reach and in her possession when they were ordered to be destroyed.

In argument it is urged that the State is estopped by the information given by one of her officers that the bonds sued upon were valid bonds.

If that plea were maintained, it would be equivalent to maintaining a ratification.

No such ratification could be made.

We have found no grounds to reverse the judgment appealed from.

Judgment affirmed at defendants' costs.

His Honor Mr. Justice Fenner, concurring.

The case presents two questions, viz.:

1. Are the bonds in controversy valid and subsisting obligations of the State of Louisiana? If so, plaintiff has received all that she bought or intended to buy, and has nothing to complain of.

2. Even if said bonds are invalid, are the defendants bound to reimburse the price they received for them?

I.

It is shown that four of the bonds are consolidated bonds of the State, which on and prior to the 1st day of January, 1880, were held by the State "for the use of the Agricultural and Mechanical College Fund." As to these bonds, the Constitution of the State, Article 233, declares: "The consolidated bonds of the State now held by the State for the use of said Fund shall be null and void after the 1st day of January, 1880, and the General Assembly shall never make any provision for their payment, and they shall be destroyed in such manner as the General Assembly may direct."

The remaining bond in controversy is a consolidated bond, which had been surrendered to the State in ex-

change for a constitutional bond, in pursuance of the provisions of the State debtor dinance, which, by virtue of its ratification by the people, became a part of the Constitution.

At its first session, after the adoption of the Constitution, the General Assembly passed an act providing for the cancellation and destruction of the bonds so surrendered and exchanged. Act 121 of 1883.

Instead of retaining, cancelling and destroying these bonds, which had thus been conclusively extinguished and rendered null and void by the mandate of the Constitution, it appears that the then treasurer of the State fraudulently abstracted them from the treasury of the State and placed them on the market.

The proposition that such fraudulent act could have effect to revive the extinguished obligation of the State upon these bonds or could confer upon the existing government of the State any right or power to make provisions for their payment, in the teeth of the positive prohibition of the Constitution, seems, to me at least, to involve the assertion of nothing less than an extravagant impossibility.

What function or power has this court except to administer and apply the Constitution and laws of the State?

We have quoted the provisions of Constitution and law bearing on this case. Are they ambiguous? No. Are they beyond the legislative authority which adopted them? No. Then whence can this or any court derive the power to nullify them?

We might rest our conclusion, with absolute security, upon two prior decisions of this court rendered in cases absolutely analogous to the instant one in every feature save that, in those cases, there was no intended fraud, but that the bonds had been emitted in virtue of authority conferred by an act of the legislature regularly passed but which the court held to be unconstitutional; and

surely no one could contend that the illegal act of an executive officer could have greater effect in defeating the constitutional rights of the State than a like act of the General Assembly approved by the Governor.

In the cases referred to, as in this, the bonds were originally valid bonds of the State: they belonged to a series of bonds of which many were still rightfully outstanding, and from which they were undistinguishable in any respect except as to the numbers which they bore; they were negotiable in form and were held by purchasers in open market, and before maturity, and with no other notice "than would result from their presumed knowledge of the acts and proceedings of the State and its officials."

The same arguments, based upon the law of negotiable instruments, were addressed to the court then as now: but the court, after reciting the constitutional and legal provisions which prohibited the emission of those particular bonds, said: "These laws, to all intents and purposes, took these bonds out of commerce. They were placed in the special and joint custody of the secretary of State and treasurer, who were required to execute duplicate receipts therefor, and to be and remain a perpetual fund inviolably appropriated to support public schools. They ceased to be negotiable by virtue of these positive declarations of legislative will, and the usages and laws of commerce relative to negotiable paper are superseded by these positive enactments and are inapplicable to the case.

"We follow commercial law only when it does not conflict with statute laws of the State, but no further. It is within the power of the State to destroy the negotiability of all paper and to withdraw from commerce such things as it may deem proper."

Sun Mutual Insurance Company vs. Board, 31 An. 175.

State *ex rel.* Durant vs Board, 29 An. 77.

These decisions are for us the highest of all judicial authority as to the subject matter of which they treat—higher even than that of the Supreme Court of the United States, unless it can be shown that they involve some Federal question, on which we acknowledge the paramount authority of that high tribunal.

We can discover no Federal question in those cases or in this. Nobody would seriously question the power of the State to modify, repeal or abrogate the Law Merchant, except, at least, in so far as such action might impair contract rights existing at the date of such legislation; and inasmuch as the rights here involved necessarily arose after the date of the legislation and after the facts which gave effect thereto, this possible exception can not apply.

In absence of any Federal question, it may be confidently asserted that in such a case, involving simply the interpretation and application of the constitution and laws of the State, the Supreme Court of the United States, in accordance with its conservative and settled policy, would adopt and follow the decision of this Court.

Such, nevertheless, is my respect for that Court and my desire to maintain harmony between Federal and State jurisprudence, that any clearly conflicting decisions rendered by it would arrest my grave attention to the merits of such a conflict as determining whether we should maintain or overrule the prior decisions of this Court.

I fail to find anything in the Federal decisions referred to which conflicts with the decisions above referred to.

The Supreme Court of the United States has emphatically repudiated the doctrine that the Government can be bound by the frauds of its officers.

We quote its language:

"The position that, as the frauds charged were committed by officers of the United States, the court erred in

not holding their acts to be binding, and in not giving to the patents the force of valid conveyances, is certainly a novel one. The government does not guarantee the integrity of its officers nor the validity of their acts. It prescribes rules for them, requires an oath for the faithful discharge of their duties, and exacts from them a bond with stringent conditions.

"It also provides penalties for their misconduct or fraud, but there its responsibility ends. They are but servants of the law, and if they depart from its requirements, the government is not bound.

"There would be a wild license to crime if their acts, in disregard of the law, were to be upheld to protect third parties, as though performed in compliance with it."

Moffat vs. United States, 112 U. S. 24.

From this doctrine it has never deviated by a hair's breadth, save in one case, viz.: Cooke vs. United States, 91 U. S. 389.

That case, like the case of State vs. Wells, Fargo & Co., 15 California 336, involved no question of constitutional prohibition, and none of the power of the government to pay. Both were cases in which the government had actually paid the obligations, and was seeking to recover the amount so paid to *bona fide* holders.

In Cooke's case the instruments, which had been illegally issued and had been actually redeemed by the United States, were Treasury notes printed by the government, perfect in form, complete and ready for issue, intended to circulate and take the place of money, not differing, as the court said, "from coins of the mint when fully stamped and prepared for issue," and made a legal tender for the payment of government dues. We can well understand the vast importance to the government of preserving the circulating money of the country from all taint of possible doubt or suspicion; and under the stress

of that motive the majority of the court denied the right of the United States to recover. But even in that case, Justice Miller took no part, and Justices Clifford, Field and Bradley dissented on the trenchant ground "that the United States are not liable for its paper promises fraudulently or surreptitiously put into circulation, not even if the fraudulent act was perpetrated by Treasury officials."

A like question came before the court in a later case, and reference was made to the decision in Cooke's case, and the unanimous court there referred to the particular circumstances presented therein, and which I have recited above, and said: "We are not prepared to extend the scope of that decision." The court then held that the District of Columbia could not be held bound to even a *bona fide* holder of its negotiable paper not due, which had been redeemed and cancelled by the District, and had thereafter been abstracted, the cancellation mark erased with detersive soap, and fraudulently put in circulation.

District of Columbia vs. Cornell, 130 U. S. 655.

Although in the instant case, the fact of cancellation is wanting, I fail to perceive any distinction between a fraudulent failure to cancel when the law required it, and a cancellation so made that it could be effaced.

In both cases the instruments found their way into circulation through the fraud or fault of the officers, and the *bona fide* taker was no better protected by an inefficient cancellation, the evidence of which had been destroyed, than by the absence of any cancellation at all.

I consider, therefore, that the decision in Cooke's case, restrained as it is by the later decision referred to, has no application to the facts of this case; and that the last decision does apply to the facts here, and confirms the decisions of our own court.

The instant case, however, presents one feature which

separates it, by an impassable gulf, from the cases of Cooke and Cornell, viz.: the fact that the constitution of the State extinguished these obligations and forbids the general assembly from ever making any provisions for their payment.

II.

On the question of the obligation of the defendants to refund the price received for these invalid bonds, I consider it incontestable.

1. The views above expressed, and the decisions quoted, hold that the bonds in question had lost the character of negotiable instruments. It follows that the defendants' obligations are governed not by the Law Merchant, but by the provisions of the Civil Code regulating the contract of sale of non-negotiable incorporeal rights.

A mere reference to the articles of the Code clearly shows that the vendor of such a right warrants its existence and validity.

Revised Civil Code, 2474, 2475, 2476, 2500, 2520, 2646.

2. Even were it admitted that the bonds retained the characteristics of negotiability, as between the parties to dealings in them, I consider that, under the Law Merchant, the assignor warrants the genuineness, the validity and legal operation of the negotiable instruments assigned by him.

Benjamin on Sales, 4th edition, page 695.

Daniel on Negotiable Instruments, § 730 *et seq.*

Tiedeman on Commercial Paper, § 244 *et seq.*

Parsons on Bills, pages 37 and 42.

Young vs. Cole, 31 Bing. N. C. (Eng.), 724.

Westrop vs. Salomon, 8 C. B. 345.

This question has been decisively settled by this court in a case where the assignor held in good faith a treas-

ury-note of the United States which, it subsequently appeared, had been redeemed and cancelled by the United States, but had been fraudulently purloined, the cancellation erased and put in circulation. His assignee, after discovering these facts, sued him to recover the price, and this court awarded it.

Knight vs. Lantear, 7 Robinson, 172.

The court said: "It is clear that the sale must be rescinded on account of the error of the plaintiff (and we believe of defendant also) as to the substance of the object of the sale. * * * If the character of the note, and all the circumstances attending its redemption, the purloining of it, and the conduct of the officers of the United States before and after the purloining had been disclosed to the plaintiff when he purchased the note, it is clear he would not have bought. He wished to purchase, and believed he was purchasing, an unadulterated treasury note, receivable in payment of duties, and saleable at the market price—one which he could not be compelled to take back after he had sold it. He was in an error when he received the note which is the subject of the present suit. His error prevented his consent, and the absence of his consent deprived the sale of all its effects and consequences."

The case of Otis V. Cullom, 92 United States, 447, which is relied upon as counter to the doctrines above enunciated, is clearly distinguishable and rests upon an entirely different principle, viz.: that "the plaintiffs in error got exactly what they intended to buy and did buy." The facts showed that they bought bonds of the City of Topeka which had been issued under certain laws of the State of Kansas, which were subsequently decided to be unconstitutional, and the bonds annulled. All the bonds issued under these laws stood in the same case; it was not a case where

some were good and some bad. The plaintiff simply bought bonds issued under these laws, and he received bonds so issued and just as good as any other bonds so issued. He got what he bought and intended to buy, and could not complain, his information as to the matter being the same as that of his assignor.

But here, the bonds sold are part of the consolidated bonds of the State of Louisiana, all of which are valid and binding obligations of the State, except those which have been annulled or redeemed. Obviously the plaintiff here intended to buy good bonds—not worthless similitudes which had been extinguished by constitutional mandate or by valid redemption. She did not get what she bought, and her assignor can not keep the good money which he received for bad bonds.

The Supreme Court of Nebraska has, in a forcible opinion, shown the inapplicability of Otis vs. Cullom to cases like this.

Roger vs. Walsh, 12 Nebraska, 28.

Yielding the utmost force that can be claimed to the equitable considerations which might influence the State in assuming responsibility for the wrongs inflicted on third persons by the fraudulent acts of its own chosen officers, the stubborn fact remains that the existing government is not bound, and even lacks the power, to make any provisions for the redemption of these bonds. This leaves the case within the inexorable grasp of the authority of the decision in Knight's case, where the court went much further than we can go in this case, and said: "We have considered the defense in the most favorable view in which it can be placed for the defendants.

"We have assumed for the sake of argument, that the conduct of the officers of the Treasury Department, of the Custom House, and of the bank at which the interest was paid, had been such as to entitle the fair holder of

the note to demand its amount from the United States." But even on this hypothesis, the court said the purchaser did not buy "the chance of a successful application at Washington for the reimbursement of what he advanced. He wished to purchase, and he believed he was purchasing, an unadulterated treasury note, receivable in payment of duties at the custom house, and salable at the market price, one which he could not be compelled to take back after he had sold it. He was in error when he received as such the note which is the object of the present suit. His error prevented his consent; and the absence of his consent deprived the sale of all its effects and consequences."

It is apparent that plaintiff intended to buy, and defendants to sell, untainted and unquestioned bonds of the State, the redemption of which in principal and interest is provided for in the existing constitution and laws, not bonds which the government of the State as organized under that constitution can not and will not provide for, and which can never be recognized or redeemed by any power short of an amendment of the constitution.

For these reasons, as well as for those more elaborately stated in the principal opinion, I concur in the decree, and Justices McEnery and Breaux also concur in this opinion.

His Honor, Mr. Justice Watkins (dissenting):

It appears, that on April 24, 1889, the plaintiff bought of defendants' five bonds of the State of Louisiana, of $1000 each, for which she paid $4443·75; and, alleging her subsequent discovery of the fact that said bonds were not valid and that the State had refused to recognize them, she demands of defendants restitution of the price paid therefor.

The grounds of nullity assigned are, viz.:

First—That four of said bonds, those numbered, re-

spectively, 742, 842, 866, and 883, which heretofore formed a part of the consolidated bonds held by the State for the use and benefit of the Agricultural and Mechanical college, were, by the 233d article of the State constitution, declared to be null and void after the 1st day of January, 1880, and, for the payment of which, the legislature was, in terms, prohibited from making any provisions; and that it also commanded that same should be destroyed, in such manner as the general assembly may direct.

Second—That the bond numbered 5611, being one of the series of consolidated bonds which had been exchanged under Act 121 of 1880, for constitutional bonds, and—quoting from plaintiff's brief, page 3—*is paid and extinguished.*

Against this action three defenses are set up, viz.:

First—That defendants acted as brokers, and are only liable for frauds or faults, and are free from both.

Second—That if the transaction is deemed a sale, it was of a specific thing, and defendants delivered exactly what the plaintiff bought.

Third—That the bonds in question are valid outstanding obligations of the State.

I.

On the first proposition, my opinion is in accord with that of the majority of the court, for the reasons stated, that if defendants acted as brokers in the transaction, and sold the bonds to plaintiff, for other persons than themselves, their liability is that of vendors, for the reason they failed to disclose the fact of their having acted in that capacity, or the names of their principals.

Brokers buy and sell on their own account customarily, as well as upon the account of others. If they sell on their own account, they are evidently responsible; and,

to avoid such responsibility, they must show who their undisclosed principals are.

II.

On the second proposition, I am, also, in accord with the majority of the court: that is to say, if the transaction is to be viewed as one of sale, or assignment, and, therefore governed by the precepts of the Civil Code, and not as a transfer of negotiable instruments, and, therefore, constrolled by the principles of the law merchant. For, as vendors of bonds, as articles of merchandise, defendants are bound, under the law of warranty, to protect plaintiff; while as *bona fide* holders and transferrors of negotiable securities a different rule obtains.

For, say the Supreme Court, speaking through Mr. Justice Swayne, in *Murray vs. Lardner*, 2 Wall. 110: "The general rule of the common law is, that, except by a sale in market overt, no one can give a better title to personal property than he has himself. The exemption from this principle, of securities, transferable by delivery, was established at an early period."

III.

But on the third proposition I cannot agree with the majority of the court.

The proof is clear to the effect that the bonds in question are genuine consolidated bonds of the State of Louisiana, regularly and properly issued under and in pursuance of the funding laws and the corresponding constitutional amendment.

That they were duly signed by the Governor, Auditor and Secretary of State, and the interest coupons thereto attached were signed by the State Treasurer and Auditor, as required by the provisions of section 3 of the funding act of 1874.

That they were apparently issued by the Board of Liquidation, provided by section 2 of that act, and were by said board regularly exchanged for "valid outstanding bonds of the State," and possessed, primarily, a good consideration.

That they were payable to bearer at forty years, from the 1st of January, 1874, regularly numbered, and bear interest at the rate of 7 per cent., payable semi-annually.

That they composed and represented a part of the bonded debt of the State, the amount of which was fixed in the funding act of 1874 at $15,000,000, and which was intended to "constitute a systematized issue of bonds, having uniformity in date, maturity and form."

Hope & Co. vs. Board of Liquidation, 43 An. 763.

These facts are not questioned by the opinion of the majority, nor by counsel for the plaintiff, the theory of the latter being that said bonds *heretofore formed a part of the consolidated bonds of the State*, but for reasons assigned, as *subsequently* happening, same had *ceased* to be legal and valid obligations of the State. It is this latter proposition that the defendants deny.

In order to test the validity of said bonds, in the hands of defendants, as holders thereof, on the 25th of April, 1889, the date plaintiff purchased them, the *status* of the bonds, primarily, must be ascertained and first determined.

For, on the foregoing state of facts, the defendants' contention is that they were *bona fide* holders of the negotiable paper of the State of Louisiana, maturing at a date in the future, and are entitled to the protection of the law merchant; on the theory that a State, like the United States, when she makes herself a party to negotiable instruments, through her duly authorized officers, acting under constitutional and statutory warrant, incurs all the

risks and responsibilities of an individual maker, or indorser of such instruments, under like circumstances.

Whilst, on the other hand, counsel for the plaintiff, admitting "that, as between holders of said bonds, they are governed, in all particulars, by the jurisprudence applicable to negotiable instruments," denies that, "*as regards the State*, the principles can be so sweeping." For, says he, "to admit such a proposition, would concede the power of an officer charged with the emission of certain State, or municipal securities, to overwhelm the State, or municipalities, with an unlimited and incontestable debt."

Wherefore, the first question to be solved, in the effort to test the primary validity of the bonds under consideration, is the capacity and character of the State as maker thereof.

(*a a.*)

Apparently, these bonds are invested with the fullest sanction that could be given to any piece of paper which a sovereign State *could* issue, and put upon the markets of the world.

They have the fullest possible sanction of the legislature of the State, as expressed in the funding statutes.

At the same session of the general assembly, whereat the funding laws were enacted, a constitutional amendment was proposed, which declared, *inter alios*, that "the issue of consolidated bonds authorized by the general assembly of the State, at its regular session in 1874, is hereby declared to *create a valid contract between the State, and each and every holder of said bonds, which the State shall by no means* impair;" and that "the said bonds shall be *valid obligations of the State, in favor of any holder thereof, and no court shall enjoin the payment of the principal or interest thereof*, or the levy and collection of the tax therefor," etc. (Italics are mine.)

Act 3 of 1874, Acts, page 42.

This amendment was adopted as a part of the organic law prior to the date of the issuance of said consolidated bonds, and constituted and remained a part thereof until the 1st of January, 1880.

Hence the whole series of consolidated bonds was not only authorized by statute and constitutional amendment, but in said amendment the bonds are declared to be "*valid contracts* between the State, and each and every holder thereof," and also "*valid obligations of the State in favor of any holder thereof.*"

It were, in my opinion, a vain effort to search out words of more evident and emphatic import with which to clothe a statutory or constitutional mandate, authorizing certain designated State officers to bind the State to a solemn contract, than are those I have just quoted from the funding statute and constitutional amendment.

Manifestly, it was upon the faith of these laws—statutory and constitutional—that the public creditors of the State accepted such consolidated bonds, and gave in exchange therefor other warrants and obligations of the State.

Then, what is the position the State occupies in such a contract, towards its creditors, and other persons who acquire possession of such paper in market overt?

An examination of the authorities will attest the truth of the rule to be, that the government of a State, like that of the United States, when she makes herself a party to negotiable paper, incurs all the risks and responsibilities of an individual maker, or indorser, of such instruments, under like circumstances.

One author states the rule to be that "government bonds, payable to bearer, or otherwise negotiable in form, are negotiable instruments, and may be transferred as such."

Randolph on Commercial Insurance, page 449, section 348:

"The government of the United States, it has been held, may, by its authorized officers, become a party to negotiable paper *with all the rights and liabilities of an individual, except the liability to be sued.*" Ib. Section 350.

Another states it thus:

"Except in so far as the power of the government may be restricted by constitutional limitation, there can be no doubt that both the *State* and Federal Government may, by their duly authorized agents, become parties to *any species of commercial paper.*"

Tiedeman on Commercial Paper, page 129, section 132.

Another author puts it thus:

"There is no doubt that when an officer of the governs ment, Federal or *State*, who is authorized to bind the government as drawer, maker, or acceptor of a negotiable instrument, draws or accepts a bill, or makes a note in behalf of the United States, or the *State* which he represents, its validity can not be questioned when it ha passed into the hands of a *bona fide* holder for value, without notice of any defect.

"The government would then be bound by its negotiable paper, *just as an individual would.*"

1 Daniel on Negotiable Instruments, page 330, section 436.

The foregoing opinions of text-writers are founded, in the main, on the authority of *United States* vs. *Bank of Metropolis*, 15 Peters, 377, and *Floyd Acceptances*, 7 Wallace, 666.

And, in my opinion, I cannot do better than quote a single paragraph from the *former* case, as presenting in the clearest light the view entertained by the Supreme Court on the question.

They say: "When the United States, by its authorized officer, becomes a party to negotiable paper, they have all the *rights*, and incur all the *responsibilities*, of *individuals* who are parties to such instruments. We know of no difference, except that the United States can not be sued. But if the United States *sue*, and a defendant holds its negotiable paper, the amount of it may be claimed as a credit, if, after being presented, it has been disallowed by the accounting officers of the treasury; and if the liability of the United States upon it be not discharged by some of those causes which discharge a party to commercial paper, it should be allowed by a jury, as a credit against the debt claimed by the United States."

Citing 1 Story, 464.

United States vs. Dunn, 6 Peters, 57.

United States vs. Barker, 12 Whea. 561.

And one selected from the latter case puts the governing rule in even a stronger light; for in that case the court, speaking through Mr. Justice Miller, said:

"It must be taken as settled, that when the United States becomes a party to what is called commercial paper—by which is meant that class of paper which is transferable by indorsement, or delivery, and between private parties, is exempt in the hands of innocent holders from inquiry into the circumstances under which it was put in circulation—they are bound in any court to whose jurisdiction they submit, by *the same principles that govern individuals in their relations to such paper*." (Italics are mine.)

Those two cases involved time drafts, or bills of exchange drawn—one by a contractor for army supplies, on, and accepted by, the Secretary of War; and the other by a mail contractor, on, and accepted by, the Postmaster General—and in possession of third holders for value before maturity.

But in *Vermilye & Co. vs. Adams Express Co.*, 21 Wall. 138, the court dealt with United States treasury notes, and in the course of its opinion said:

"We cannot agree with counsel for the appellants, that the simple fact that they were the obligations of the government takes them out of the rule which subjects the purchaser of overdue paper to an inquiry into the circumstances under which it was made, as regards the rights of antecedent holders"—thus reaffirming the same doctrine as that announced previously.

This principle has been announced in many recent cases, and notably in *Murray vs. Charleston*, 96 U. S. 432, in which the court employed this emphatic language, viz.:

"The truth is, States and cities, when they may borrow money, and contract to repay it with interest, are not acting as sovereignties. They come down to the level of individuals. Their contracts have the same meaning as that of similar contracts between private persons. Hence, instead of there being, in the undertaking of a State or city to pay, a reservation of a *sovereign right to withhold payment*, the contract *should be regarded as an assurance that such a right will be exercised*. A promise to pay with a reserved right to *deny* or change the effect of the promise is an absurdity."

In Louisiana vs. Jumel, 107 United States 711, the Supreme Court, in speaking of the identical issue of consolidated bonds we are now considering, said:

"Whatever may be ordinarily the effect of a promise, or a pledge of faith by a State, the language employed in this instance shows unmistakably a design to make these promises and these pledges so far contracts that their obligation would be protected by the constitution of the United States against impairment."

I have gone into this question very thoroughly, on ac-

count of its overshadowing importance, in my opinion, in this case; and, in so doing, I have confined myself to the views of text-writers and opinions of the Supreme Court; not because I was dealing with a federal question, but because I regarded them as the best exposition of the law merchant, with respect to negotiable securities of the governments of the United States, and of the States.

Having, as I confidently submit, made a demonstration of the proposition that prefaces this paragraph—that is to say, in the execution of negotiable instruments payable at a future date, governments come down to the level of ordinary persons, and incur all the responsibilities of individuals who are parties to such instruments, while possessing all of their rights—I will next address myself to the charges of nullity and illegality which the plaintiff assigns as the ground she relies upon for recovery of defendants; and at the risk of being tedious, I will re-state the case, as presented by the pleadings, and then analyze the evidence that is furnished us in the transcript of the nullity and illegality of the bonds in suit.

We will first examine the case as applicable to the four bonds which are denominated Agricultural and Mechanical College bonds of $1000 each.

(*b b.*)

The plaintiff alleges that she purchased of defendants, as brokers in bonds, doing business as such, in the city of New Orleans, twenty bonds of the denomination of $1000 each, "known commonly as four per cent. bonds of the State of Louisiana," with interest coupons attached, and for which she paid 88⅞ cents on the dollar—that being the price therefor at that date.

That said bonds have since remained in her possession, and "she discovered only recently that four of said bonds, numbered respectively 742, 842, 866 and 883, are

not legal bonds of the State of Louisiana: that they have never been lawfully issued: that they were not, at the time of said *sale*, and have never since been, valid and legal obligations of the said State; and that they are a part of the consolidated bonds which were formerly held by the treasurer of the State of Louisiana for the use of the Agricultural and Mechanical College Fund, and that said bonds were declared by the 233d article of the Constitution of Louisiana to be *null and void after the first day of January, 1880*, and that the General Assembly of Louisiana was prohibited by said article from ever providing for the payment of said bonds."

In addition, her petition contains the distinct admission that she collected the interest coupons on said bonds, maturing on the 1st of July, 1889, subsequent to her acquisition of them from defendants, and avers she presented those coupons, maturing on the 1st of January, 1890, to the fiscal agent for payment, but payment thereof was refused.

It thus appears that plaintiffs' charges are founded exclusively upon the nullity resulting from the declaration of the Constitution, and not upon any specific charge of fraud upon the part of any officer of the State government, or upon any averment of embezzlement or theft of said bonds from the custody of any State fiduciary or depository.

There is no averment that defendants acquired said bonds, or any one of them, *mala fide*, or with knowledge of the alleged nullities, other than such as may have been conveyed to them by the said constitutional provisions.

Defendants answer alleges that they are and have been large dealers, as brokers and otherwise, in the bonds of the State of Louisiana, which are negotiable securities, not yet due, and customarily bought and sold in open market, here and elsewhere, and, as such, they pass

daily from hand to hand without other warranty than that the signatures thereto are genuine.

They aver that these bonds are such negotiable instruments as were put in circulation by and through the duly appointed officers of the State for value, and that, in their hands, same are and were good and valid obligations of the State, and unimpeachable as to all equities existing between the State and her officers, and consequently plaintiff is without any right of complaint.

Now, what is the evidence furnished by the transcript on the issues thus presented?

Taking the facts, chronologically, I find the following, viz.:

(*a*) That on the 30th of November, 1874, there were presented to the Board of Liquidation 327 Agricultural and Mechanical College bonds, of $1000 each, for exchange in consolidated bonds, under and in conformity with the provisions of the funding act of 1874.

(*b*) That up to, and inclusive of, the date March 11, 1889, the following is the exact *status* of the bonded indebtedness of the State of Louisiana, viz.:

Whole amount of *consolidated*	$12,110,500
Less constitutional bonds	290,200
Difference	$11,820,300

And that, of that amount, there had been issued consolidated bonds, of the denomination of $1000 bonds, numbered from 1 to 10,000.

To this effect was the report of the present State treasurer to the secretary of the New York Stock Exchange on the date specified.

(*c*) A like statement is contained in the auditor's report for the years 1888 and 1889, from which is deducted the sum of $196,200, as representing Agricultural and Mechanical College bonds.

(*d*) The official report of the treasurer, made for the year 1879, shows that there were, in *general terms*, on hand at that date, viz.:

"One hundred and ninety-six bonds, of $1000 each, issued by the State of Louisiana, under Act 3 of 1874, numbered 710 to 905, inclusive; two bonds of $100 each. Total held for account of Agricultural and Mechanical College, $196,200.

(*e*) The present auditor and treasurer—the former having been the incumbent for eight or ten years, consecutively—state, as witnesses, that they "have never seen any of these bonds until recently; and that all of their knowledge, in that respect, is derived from official documents"

(*f*) The treasurer states, that the interest coupons upon the bonds in question, maturing on the 1st of July, 1888, and the 1st of January, 1889, were paid by the banks in New Orleans that were acting as fiscal agents of the State; and the plaintiff's agent states, as a witness, that he collected the interest coupons falling due on the 1st of July, 1889, but that those falling due on the 1st of January, 1890, were refused payment.

(*g*) The treasurer states, that there is in his office no evidence of his predecessor having made any report under Act 121, of 1880, in reference to the surrender of consolidated bonds.

(*h*) Whilst there was a joint committee of the General Assembly of 1880 appointed, and which, *in a general way*, represented in its report that the Agricultural and Mechanical college bonds, *inter alios*, were on hand, and recommended the appointment of a committee, with authority to destroy them, this appears never to have been done.

House Journal of 1880, page 472.

(*i*) Another joint committee of the General Assembly

of 1882 adopted a resolution authorizing the auditor and treasurer to destroy the bonds referred to in the resolution of 1880, but no action seems to have been taken under it.

Resolution of 1882, No. 127.

(*j*) Up to July, 1888, all the coupons carried by the banks, as stated in paragraph *f*, were subsequently destroyed by a joint committee of the General Assembly.

(*k*) On the 20th of September, 1889, the said treasurer sent to the secretary of the New York Stock Exchange a communication stating that "the following consolidated bonds of the State of Louisiana were declared null and void after the first day of January, 1880, by Article 233 of the Constitution of 1879, viz.:

"College and Seminary funds, 196 bonds of $1000 each, Nos. 710 to 905."

But he failed to state that said bonds were on hand—and then concluded his letter thus, viz.:

"The foregoing bonds are null and void, and as coupons of some have been presented for payment, it would appear that [some of the] bonds were on the market."

(*l*) On the 7th of September, 1890, previously, the auditor had given formal notice to the treasurer, and to the fiscal agents of the State, of suspicions he entertained in reference to these bonds of the Agricultural and Mechanical College.

(*m*) Contemporaneously an investigation was put on foot by the auditor and treasurer, which disclosed that a number of interest coupons corresponding with these bonds had been paid by the banks.

(*n*) At page 16 of the joint report made by said officers I find the following, viz.:

"Only since the adoption of the report of the joint committee appointed under concurrent resolution No. 5 of 1888, have coupons paid by the State's agents in London,

New York and New Orleans, been turned over to the auditor for cancellation, *and it was when entering these coupons, taken up between January 22 and July 30 last (1889), that numbers corresponding with the numbers of several of said bonds on the coupon books, which were marked cancelled, were found.*" (Italics are mine.)

"A further investigation disclosed the fact that these coupons are not counterfeit, but coupons clipped from bonds which are supposed to have been destroyed, as required by Act 121 of 1880, and concurrent resolution 127 of 1882."

(*o*) The treasurer, in answer to a further communication from the secretary of the New York Stock Exchange, making inquiry "as to the *days and dates* when the information contained in his previous letter was *promulgated, designating the numbers of the bonds* which were declared null and void," stated on the 29th of October, 1889, that "the information had been previously published in the New Orleans daily papers, and had been obtained from the banks which represent the State in the payment of the current coupons. The official report to the Governor of the State, which was published on the 29th *ultimo* and copied in the daily papers, was the *first official publication of the numbers of the illegal issue of bonds.*" (Italics are mine.)

(*p*) The purchasing agent of the plaintiff, as witness, states that he collected the interest coupons on July 1, 1889, "previous to any suspicions about the invalidity of the bonds," adding that his first intimation as to their invalidity was in August or September, 1889, and that it was obtained from the newspapers.

(*q*) One of the defendants' firm states, as a witness, that the first intimation he had of any of the bonds his firm had been dealing in being fraudulent was in September, 1889, while he was in New York, and that "up

to that time they had passed unquestioned from hand to hand," and that "same had been dealt with by the stock exchange like bank notes."

"They looked at the signatures, and if they were all right the bond passed."

Both Moore and Wheeler circumstantially state that the defendants *purchased* said bonds on the *same day and date on which they sold same to the plaintiff*.

This analysis of the evidence clearly and indisputably demonstrates that there is no proof of any *particular fraud* or act of *embezzlement* on the part of *any one*, in the emission of the four consolidated bonds, either alleged or proved.

A comparison of these four bonds, made with bond 5611 —which is not alleged to be one of the series of Agricultural and Mechanical College bonds—will show them *all* to be of *identically* the same tenor and physical appearance—the four possessing no *insignia* of their being specially dedicated to said college fund. They are parts and parcels of the whole systematized series of the State's consolidated debt of $11,820,300.00.

Aside from the report of the treasurer in 1879, there is no evidence *tending* to show that the $196,000 of Agricultural and Mechanical bonds were at any time physically in the possession of the State treasurer since they were issued by the Board of Liquidation, in November, 1874; though the proof is abundant that they have been extant since 1880. The fact that they were not destroyed by the officers designated by legislative committees of 1880 and 1882—the bonds being *in the original before the court, and in no manner defaced*—definitely suggests their *absence* from the treasury *then*.

That same have been in circulation, is evidenced by the payment of interest coupons by the State's fiscal agents—even to the plaintiff herself.

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That same have been in circulation, is evidenced by the payment of interest coupons by the State's fiscal agents—even to the plaintiff herself.

Since the passage of the Act of 1888 all interest coupons have been destroyed by legislative committees, apparently without examination or question.

Not until the 20th of September, 1889—subsequently to the plaintiff's purchase—was official notification furnished by the treasurer, to the New York Stock Exchange, that the $196,000 of Agricultural and Mechanical College bonds of $1000 each, bearing the numbers 710 to 905, had been declared null by the terms of the constitution of 1879.

Not until the 7th of September, 1889, did the treasurer himself and the fiscal agents receive any notification of their supposed illegality.

It was only by *careful scrutiny* of the coupon book, and a comparison of the numbers of the coupons thereon registered as cancelled, with the numbers of the bonds in circulation, that the auditor *made the discovery at all, and the fraudulent bonds were identified by their numbers.*

The treasurer officially states to the New York Stock Exchange, over his signature, under date October 29, 1889, that the "*first official* publication of *the numbers of the illegal issue of bonds*" was made to the Governor on the 29th of September, 1889.

The proof is clear that, at the date of the defendants' acquisition of these bonds, and their sale to the plaintiff—and antecedent to that time—that neither party to this suit entertained the slightest suspicion of them; that they passed from hand to hand in market without question; and had been theretofore dealt with by the Stock Exchange in New Orleans like bank bills.

The following is an extract from the constitution of 1879, which is relied upon as anulling the Agricultural and Mechanical College bonds, viz.:

"The debt due by the State to the Agricultural and Mechanical College fund is hereby declared to be the

sum of one hundred and eighty-two thousand three hundred and thirteen and $\frac{3}{100}$ dollars, being the proceeds of the sales of lands and land scrip heretofore granted by the United States to this State for the use of a college, for the benefit of agriculture and the mechanic arts; said amounts shall be placed to the credit of said fund on the books of the auditor and treasurer of the State as a perpetual loan, and the State shall pay an annual interest of five per cent. on said amount from January 1, 1880, for the use of said Agricultural and Mechanical College; the consolidated bonds of the State now held by the State for the use of said fund shall be null and void after the 1st day of January, 1880, and the General Assembly shall never make any provision for their payment, and they shall be destroyed in such manner as the General Assembly may direct."

Let me for a moment consider this constitutional mandate in reference to the bonds in question, and see what it is.

First. It fixes the amount of the debt of the State at $182,313 $\frac{3}{100}$, and directs that that sum shall be placed to the credit of Agricultural and Mechanical College fund on the books of the auditor and treasurer of the State as a perpetual loan at interest.

Second. It declares that "the consolidated bonds of the State now held by the State for the use of said fund *shall be null and void after the 1st of January, 1880.*"

Third. It declares that "the general assembly shall never make any provision for their payment."

Fourth. "It further declares that said bonds *shall be destroyed* in such manner as the general assembly may direct."

The first thing that strikes my mind is that there is a marked inconsistency between the 1879 report of the State treasurer, that is so much relied upon, and the article

of the constitution, in that the constitution fixes the debt of the State to the Agricultural and Mechanical College fund at a little over $182,000, whereas the treasurer's report fixes the amount of the Agricultural and Mechanical College bonds at $196,000, the amount of the bonds exceeding the amount of the debt recognized by $14,000.

What has become of the surplus of bonds which did not come within the reach of the constitutional fiat?

Who is to venture the assertion, *ex gratia*—for there is no evidence on that subject in the transcript—that the bonds in suit are not of that surplus?

Keeping in mind that, in the treasurer's official announcement to the secretary of the New York Stock Exchange, on the 29th of October, 1889, several months *subsequent* to the defendants' acquisition of their bonds, in open market, that "the first *official publication of the numbers of the illegal* issue of bonds," was made to the Governor of the State on the 29th of September, 1889, how can it be possible for any one to have known, in anticipation of that event, that these bonds did not form a part of the *surplus* of $14,000, even conceding, for the argument, that the remaining $182,000 were annulled?

In the second place, as the article in question treats them as "the consolidated bonds of the State," and only declares that they "shall be null and void after the first day of January, 1880," they were admittedly and necessarily valid *antecedent to that date*.

And if they went into circulation, while esteemed to be valid by the terms of the constitution—and nothing is shown to the contrary—any attempt to annul them, in the hands of innocent third persons, would be justly considered an attempted impairment of a protected contract.

Louisiana vs. Jumel, 107 United States, 711.

In the next place, it is perfectly plain that the General Assembly has failed to carry out the constitutional man-

date to *destroy* said bonds, and thus left it in the power of others to put them into circulation, and thus practice a fraud upon the State. For, one of two propositions is clear: first, the bonds were *not* in the State treasury in 1880, or subsequently, and, therefore, were unaffected by the article of the Constitution; or, second, if *they were*, the General Assembly was at fault, in not having caused them to be *destroyed*, and thus put out of the reach of the thief and embezzler.

In the last place, it is also plain, that the failure of the General Assembly to cause these bonds to be destroyed, has resulted in the payment of their interest coupons during the years since 1880, and thus accomplishing, by *indirect* means, a violation of the constitutional prohibition, that "the General Assembly shall never make any provision for their payment," as well as to induce the commercial world to put its trust in them as *valid* State securities, relying on the *knowledge* and *good faith* of the States fiscal agents, in paying the coupons.

And just here a question arises, as to the effect the public records and other official *data*, herein before mentioned, have, as matter of law, upon dealers in such public securities; and I will, *en passant*, express my view upon it.

My belief and deliberate conviction are, that they do not effect them with any notice at all.

Mr. Daniels states the rule thus:

"Parties negotiating for negotiable instruments are not bound to take notice of public records and litigation *which would affect them with notice were they dealing with the subject matter*.

"And, therefore, when there is *nothing* on the face of the bill, or note, *giving notice* of any defect, the fact that the deed of trust securing its payment contains recitals which show the equities or offsets existing between the *original* parties, does not weaken the position of a *bona fide* holder without notice."

Daniels on Negotiable Instruments, Section 880.

This doctrine has been accepted and approved by this court, in *Morris vs. Cain*, 39 of Annuals at pages 731 and 732.

In a previous case, this court also took occasion to announce the same principle in a different form of expression, thus: "Had the note been *paraphed* to identify it with the act of pledge, the defendant might, perhaps, have charged that the pledgee was thereby *put on his guard*—notified of the declaration contained in the act of sale, and bound thereby, *etc.* * * * What he was *bound to know* was what he could have known, and, in point of fact, did know."

Schepp vs. Smith, 35 An. 3.

These are matters a purchaser of negotiable instruments is *not bound to know* as they appertain to matters *de hors*, the instruments themselves arising *subsequent to their execution and issuance* by competent authority.

(*c. c.*)

I will now retrace my steps and take up the consideration of bond 5611.

The treasurer and auditor state, as witnesses, that there are no reports or other evidences in either of their offices of the surrender of any consolidated bonds in exchange for constitutional bonds, under and in pursuance of Act 121 of 1880, and, consequently, there is none in reference to this particular bond 5611, against which the plaintiff brings the charge of nullity, because of its surrender under the provisions of the debt ordinance.

There is, however, some parol testimony tending to show that this bond was surrendered for exchange on the 6th of July, 1883. In the communications of the treasurer to the New York Stock Exchange in 1889, it is stated that there were twenty-one (21) consolidated bonds,

of the denomination of $1000 each, surrendered for exchange in constitutionals, under Act 121 of 1880, and among the numbers furnished is found that of 5611: and then it is announced that they are all null and void.

But there is no proof that any legislative or other proceeding was undertaken, *subsequent* to the date specified, *looking* to the destruction of such surrendered bonds, as the statute required.

Then it is pertectly clear that this bond must be treated in this discussion just as it was evidently dealt with in market, *as* a *valid* consolidated bond—appearing as it does, here, in the *original*, without a mark or blemish of any kind upon it, and possessing all apparent *indicia* of a negotiable State security not yet due.

This bond does not come under the nullifying ban of the constitution.

Therefore, all five of the bonds in suit (or under consideration in this suit, to speak more accurately) may be put on the same basis and disposed of similarly.

(*d. d.*)

What are the defenses that can be *successfully* urged against negotiable State securities, in the hands of an innocent holder for value before maturity? That is the precise question we have confronting us here.

The general rule, as formulated by Mr. Daniels, in reference to individuals, is as follows, to-wit:

"By *purchaser* or *holder* of a negotiable instrument is intended any one who has acquired it in good faith, for a valuable consideration, from one capable of transferring it * * in the ordinary course of business * * without notice of facts which impeach its validity as between antecedent parties."

Such a holder possesses a title "unaffected by those facts and may recover on the instrument, although it may

be without *any legal validity as between antecedent parties;* as for example, even though it was *originally obtained by fraud, theft*, or *robbery*."

1 Daniel on Negotiable Instruments, page 556, section 769.

He extends that doctrine still further and says:

"It is to be observed, as a general rule, the purchaser can never be placed on a worse footing than his transferror, although he himself could not, in the first instance, have acquired the vantage ground occupied by such transferror. And, therefore, even if he have notice that there was *fraud* in the inception of the paper, or that it was *lost*, or *stolen*, or that the consideration had failed, between some antecedent parties, or the paper be overdue and dishonored, he is, nevertheless, entitled to recover, *provided his immediate vendor was a bona fide holder for value, unaffected by any of these defenses.*"

Id. 803.

That principle was announced upon the authority of numerous adjudicated cases by the highest courts in many States—our own amongst the number—and of the Supreme Court in *Commissioners vs. Clarke*, 94 United States, 285.

That section was quoted from Daniels, with approval, in *Levy vs. Ford*, 41 An. 870, and upon the correctness of that principle,

I feel that I may rest with confidence.

Thus it is that the *possession* of a negotiable instrument by such a holder carries with it a title that is fully protected against charge of *fraud* or *theft*, or *failure* of *consideration* between antecedent parties; and that rule of property in such paper is so strong that such holder can convey to another a valid and indefeasible title, although the latter *knew* of its inherent defects.

Not only so, but any one charging *mala fides* in such holder has the burden of proving it put upon him.

Id. Section 769.

Having announced the general rule as above, the author then proceeds to deal with other grounds of defense, and says:

"That, *suspicion* of defect of title, or knowledge of circumstances which would excite suspicion in the minds of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat his title, * * subject to the following modifications or qualifications, viz.:

"That where it is *shown* by the defendant that the instrument *originated* in fraud, or illegality, the burden of proof will be shifted to the holder, and he must then prove that he is a *bona fide* holder for value.

"2. Where it is *shown* that the instrument was *given* for a consideration which by statute is declared void, the *original taint* follows it, and it is void in the hands of *every holder, however innocent.* And that *no party* can enforce a negotiable instrument, if it be not *genuine*, or if it be *executed* by a party *incapable of entering into the contract on which it was given.*" (Italics are mine).

Id. page 557, sections 769, 806.

Then he generalizes the principle and says:

"But the rule of the text is, we think, in conformity with the current and weight of authority and the law merchant.

"The fraud which shifts the burden of proof must be in the *consideration* or representations used in obtaining the *execution* of the instrument, and *not in the after breach of trust in diverting* it from the uses for which it was intended."

Id. p. 596. Sec. 792.

This precise distinction has been taken, substantially, in many cases decided by our predecessors.

Oliver vs. Andry, 7 Louisiana, 498.

Dick vs. Leverich, 11 Louisiana, 576.
Jackson vs. Commercial Bank, 2 Robinson, 138.
Bank vs. Bank, 16 Louisiana, 457.
Labadie vs. Association, 4 Robinson, 190.
Babbit vs. Hewitt, 11 An. 327.

It finds complete sanction in the recent jurisprudence of the Supreme Court, as attested by the following cases:

Murray vs. Lardner, 2 Wallace, 110.
Orleans vs. Platt, 99 United States, 676.
Shaw vs. Railroad Co., 101 United States, 557.
Collins vs. Gilbert, 94 United States, 753.
Cromwell vs. County of Sac, 96 United States, 59.

And numerous other decisions.

Mr. Randolph, in his treatise on Commercial Instruments, says:

"In order to constitute a valid security, any bond or negotiable obligation of the *State* must be *issued* on authority of the Constitution and statute law."

1 Randolph Commercial Instruments, page 494, section 348.

And he lays down the general proposition, that the powers and duties of officers and agents "of the government, whether Federal or State, are defined by statute, which is notice to the world of the limitations to their authority." Id. section 440.

The same author states the rule with regard to the negotiable instruments of a municipal corporation thus:

"It may be laid down as a general principle that debts *unlawfully contracted* by a municipal corporation are not binding upon it.

* * * * * * *

"So, a municipal bond *issued without authority*, although it be negotiable in form.

"And the defense of *original want* of *authority to issue the* bonds is available against all holders."

1 Randolph Commercial Instruments, page 488, section 343.

Mr. Dillon, in treating of the same question, says:

"And it is a general and fundamental principle that all persons contracting with a municipal corporation must, at their peril, inquire into the *power* of the corporation and its officers to make the contract; and a contract *beyond the scope of the corporate power* is void, although it be under the seal of the corporation."

1 Dillon Municipal Corporation, sections 372, 381.

Against such a contract the plea of *ultra vires* may be successfully interposed.

Id. section 381.

"In favor of *bona fide* holders of negotiable instruments, the corporation may be estopped to avail itself of *irregularities in* the *execution* of the power conferred, but it may always show that, under no circumstances could the corporation *lawfully make* a contract of the character in question."

Id. Sections 381, 416.

After announcing the foregoing rule the author proceeds to state what I conceive to be the proper line of demarcation, that is to be drawn between the authenticity of State and municipal bonds, in respect to the protection of the holder against latent equities; that is, as to *where* the power *does* exist, there being embarrassments and difficulties in respect to the *evidence* of compliance, on the part of the officers of a municipal corporation, that do not exist in respect to the acts of officers of State.

He says:

"Such a power is frequently conferred to be exercised in a *special manner*, or subject to certain restrictions, conditions and modifications; but if it appears that the bonds show by their *recitals* that the *power was exercised in the manner* required by the legislature, and that the

bonds were *issued* in conformity with those *regulations* and pursuant to those *conditions* and *qualifications*, proof of non-compliance with same will be unavailing to the corporation."

Citing as the leading authority on the question, *Commissioners of Knox County* vs. *Aspinwall*, 21 Howard 539, the author then proceeds as follows, viz.:

"Obviously, then, the most important inquiries to be considered are those which relate to the question *when the power exists* or *arises*, who is to decide whether it existed, or had arisen, when the bonds were issued, and *what* will estop the corporation which issued them to set up in defense a *a non-compliance with antecedent* or *preliminary conditions*."

Id. Section 416.

This was, in my opinion, necessary to be observed, because of what I deem to be the inapplicability of very many decisions that are cited, in reference to defenses urged against municipal bonds in the hands of third holders.

In respect to State bonds, no such embarrassment exists, inasmuch as the *law* authorizing the issuance of bonds is an exercise of *sovereignty*, only restricted by constitutional limitations; and to ascertain the authenticity of their issuance, a simple inspection of the act will ordinarily suffice.

Having examined the enabling statute, and the constitutional authority for its enactment, a mere casual inspection of the State bond will readily disclose compliance therewith on the part of the officers intrusted with the duty of its confection, and nothing further is necessary to make it available as a negotiable security.

And just here I deem it important to note what I conceive to be the inapplicability of *Otis vs. Cullom*, 92 United States, 447; *Orleans vs. Platt*, 99 United States, 676,

and *Ætna Life Insurance Company vs. Middleport*, 124 U. S. 545, to the case at bar, and it is this:

Those cases proceed on the theory that, admitting the illegality of the bonds in their *inception*, the last taker has no recourse against his predecessor under the principles of subrogation in equity founded on the civil law. While this case proceeds on the theory that bonds having a *valid original existence*, having been fraudulently dealt with since, the State is relieved from responsibility thereon, and the defendants' obligation of reimbursement rests upon the Louisiana law of warranty—the law merchant not controlling the outlawed paper of the State. The theory of my dissent is that, it being first ascertained that the bonds were valid *originally*, no *after* act of fraud or illegality on the part of the State treasurer, can be regarded as defeating the title of an innocent holder, under the principles of commercial law.

So in the instant case, as there was, manifestly, no want of authority to *issue* the bonds in question, and no question of the authority of the Board of Liquidation to issue them, the defenses set up against them are clearly unavailing. No *after breach of trust* in diverting the bonds once regularly issued and put in circulation, from the uses for which they were intended, can affect their validity in the hands of innocent holders.

In *Cook vs. United States*, 91 U. S. 389, the question was, the right of the United States to recover of Jay Cook & Co. the money paid to them by the assistant treasurer, in redemption or purchase, *before maturity* of, as stated by the court. "What purported to be eighteen 7-30 treasury notes, issued under the authority of the act of August 12, 1865, but which, it is alleged, were counterfeit."

The defense was that Cook & Co. honestly believed them to be genuine, "and, so believing, in good faith

received and paid for them, and there can be no recovery, even though they may have been counterfeit; and the court held that, as the notes were ascertained to be genuine, though unlawfully and *surreptitously*, put into circulation, the government was bound for their payment, to a *bona fide* holder; and, consequently, there could be no recovery in that case. (Italics mine.)

That decision proceeded upon the theory that the notes were *perfect and complete, and in no manner cancelled or defaced;* just such as the instruments we have here.

But in *District of Columbia vs. Cornell*, 130 U. S. 655; the court while recognizing the doctrine of the Cook case, stated that they were not "prepared to *extend the scope of that decision.*"

The facts of that case were very different from those of the Cook case, as it appears from the opinion of the court, that "the certificates in suit, after they had been redeemed according to law, were cancelled by the proper officers, by *distinctly stamping* in ink across the face, words stating that fact," etc.

Had the State of Louisiana caused the same, or any similar acts, to have been done, as directed by the article of her constitution, I should certainly not find occasion to express this dissent.

Strong reliance is placed by counsel of plaintiff, as well as in the opinion of the court, on *Moffat* vs. *United States*, 112 United States 24, as stating a doctrine altogether at variance with that of the Cook case.

In this, I entertain a different opinion. also, from that of the majority.

In the execution and issuance of treasury notes, as commercial instruments, the United States made herself a party thereto as an *individual*, and not as a soverign.

But in the Moffat case, her relations with the register and receiver of the United States land office were strictly *governmental.*

The case cited was one instituted by the United States for the cancellation and revocation of two patents for land, granted under the pre-emption laws of Congress; and it proceeded upon the theory that the persons named as patentees were fictitious, and that no settlement or improvement had been made on the land, which was, under the law, a condition precedent.

The only question in that case was that of the binding force and efficacy of the *acts* of those public officials upon the government, while in the discharge of the *general duties* of their offices; and not with regard to third persons, who had acquired, under exceptional circumstances, rights protected by apparent *bona fides* of such public officers, under the law merchant.

In my opinion the government does not undertake to become responsible for the consequences of the nonfeasances and misfeasance of her agents and officers towards third persons who may deal with them. On that question the Court said in reference to the fraudulent and illegal acts of the register and receiver in issuing the patent certificates in question, viz.:

"The government does not guarantee the integrity of its officers, nor the validity of their acts. * * They are but the servants of the *law*, and if they depart from its requirements the government is not bound. There would be a wild license to crime if their acts in disregard of the law be upheld to protect third parties as though performed in compliance with it."

But to show, conclusively, that that decision was not intended to affect the question here, it is only necessary for me to cite the concluding portion of the opinion in that case, viz.: "There is, in such case, no room for the application of the doctrine that a subsequent *bona fide* purchaser is protected," etc. * * * *

"To the application of this doctrine of a *bona fide* purchaser, there must be a genuine instrument, having a legal

existence, as well as *one appearing on its face, to pass the title.* It cannot arise on a *forged* instrument, or one executed to *fictitious* parties—that is, no parties at all, however much deceived thereby the purchaser may be.

"Even in the case of negotiable instruments, where the doctrine is carried farthest, for the protection of subsequent parties acquiring title to the paper, it cannot be invoked, if the instrument is not *genuine*, or if it is executed *without authority* from the supposed maker."

Citing Floyd's Acceptances and other cases.

(*c. c.*)

The final question on which I deem it necessary to present my views, is in regard to the applicability of the cases of *the Sun Mutual Insurance Company vs. Board of Liquidation*, 31 An. 175, and *State ex rel. Durant vs. Board*, 29 An. 77.

While I concede the similarity of the questions discussed in those cases to the one under consideration here, and also concede the correctness of the principles therein announced, yet, in my view, they are inapplicable to this case. Those were suits against the State, and creditors of the State therein appearing as plaintiffs, and submitting themselves to the operation of the funding statutes, demanding the right to surrender obligations of the State, in exchange for consolidated bonds, are conclusively presumed, and must be held bound, to have accepted the *grace* of those statutes as extended to them—coupled with the right of the State to question the validity of the tendered obligations, under the terms of those laws.

Hope & Co. vs. Board of Liquidation, 43 An. 763.

State ex rel. Hope & Co. vs. Board, 42 An. 851.

State ex rel. Newman vs. Board, 39 An. 395.

State ex rel. New York Guaranty Co. vs. Board of Liquidation, 38 An. 337.

In another recent case we said:

"The State has given permission for a certain class of obligations to be presented by the holders of them to Louisiana courts for determination as to their validity; and thus in authorizing suit against herself, she has pointed out the channel through which it must reach the courts, and it must be followed."

Hope & Co. vs. Board of Liquidation, 41 An. 535.

In *Lord Cecil vs. Board of Liquidation*, 30 An. 435, a suit similar in all respects to those cited, certain bonds of the State were denied the right of exchange under the amended funding statute of 1875, on the ground that same had been, in terms, declared by that statute of doubtful validity; hence, under the terms thereof, the board was without *power* to fund them into consolidated bonds until they had been first declared "to be legal and valid obligations of the State" by this court.

Act of 1875, p. 110.

Of the issue thus presented, this court very correctly expressed the following opinion, viz.:

"Of what avail is an inquiry touching the validity of a bond, or its issuance in conformity to law, if the fact that it was not issued in conformity to law will not affect the right of the holder? Clearly, this rule of commercial law *does not apply here*. The State can be sued in her own courts *only* by her permission and in the manner and for the purposes indicated by her. The supplemental funding act required parties to resort to an action *against* the State, through a board of liquidation, to establish the good consideration and valid issue, in conformity to law, of the bonds offered for funding, and restricted this court to an ascertainment of the requisites by those bonds. It is *that law*, therefore, that must be our guide, *and not the general commercial law, in actions like the present*."

This is no such case as that one was. The bonds which were surrendered to the Board of Liquidation in exchange for the consolidated bonds in controversy, were

of unquestioned validity, being State bonds which were held in trust for the public school funds. The exchange was made *without suit* against the Board of Liquidation, and in the month of November, 1874, *prior* to the enactment of the supplemental funding act of 1875, under which the *Durant* and the *Sun Mutual Insurance Company* cases were brought and decided.

Under no circumstances can those cases be accepted as authorities controlling this case. And it would be clearly a *non sequiter* to argue from that jurisprudence as a premise, that, *after* the Board of Liquidation had acted on the claims of creditors, and issued consolidated bonds, and they had gone into free and unrestrained circulation, in the channels of commerce, that the State can, by an exercise of *sovereign power*, destroy the negotiability of those obligations to which she had voluntarily, and for adequate consideration, made herself a party as *an individual debtor*.

It will not do for this court to say, that the State is only bound for such bonds as were *physically and actually put into circulation by some authorized officer of the government, in pursuance of law*.

The Supreme Court says, in the Cook case: "This, we think, is too narrow a construction of the act." For they say, "in this (the treasury) department, the secretary represents the government. His *acts and his omissions*, within the line of his official duties, are the acts and omissions of the government itself, *and in all commercial transactions, his negligence will be deemed to be the negligence of the government*." Id. pp. 401, 404.

It appears to me, that from every point of view, that case is in exact parallel to the instant one; and, taking, as I have before remarked, the utterances of the Supreme Court, as the epitome of jurisprudence, on the law merchant in this country, I must adhere to it, and so doing I feel constrained to dissent from the views expressed in the opinion of the majority of the court.

SYLLABUS.

1. If a broker or other agent transfer paper by delivery without disclosing who is his principal, he is himself to be regarded as a principal in the transaction, and the party responsible to refund money paid for bonds which were valueless.
2. The term assignment is applied to the transfer of instruments which are negotiable without indorsement. If a bond is not a valid, subsisting obligation, according to its purport, the assignor is liable in a suit to recover amount paid him as the price, because it was not that which it was held to be, and the assignee did not recover any consideration.
3. A State bond, in negotiable form, which has come into the hands of innocent holders, after having been fraudulently reissued from the treasurer's office, is subject to defense.
4. An officer can not ratify an irregular issue of securities of the State, or give value to paper issued, *ultra vires*, or fraudulently, as he could not originally issue the paper.
5. The State is not liable for its paper promises, fraudulently issued and put into circulation, not even when put in circulation by its treasurer.